# STATE OF MICHIGAN

# COURT OF APPEALS

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TRANSPORTATION INSURANCE COMPANY, as subrogee of PRODUCTION PLATING, INC.,

Plaintiff-Appellee,

v

RAYMOND DESTEIGER, INC., d/b/a RAY ELECTRIC,

Defendant-Appellant.

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UNPUBLISHED
May 3, 2005

No. 252122
Macomb Circuit Court
LC No. 2000-004787-NO

Before: Griffin, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Defendant Ray Electric appeals as of right the trial court's order denying its motion for costs and sanctions against plaintiff Transportation Insurance Company. We affirm.

In 1996, Production Plating, Inc., an aerospace industrial supplier, retained Reynolds Electric, Inc. (Reynolds), to upgrade the primary electrical service to Production Plating's facilities. Subsequently, Production Plating's facilities were destroyed by fire. Plaintiff, as subrogee of its insured (Production Plating), thereafter filed suit against Reynolds, alleging that the fire occurred as the result of Reynold's negligent installation and failure to perform the upgrade in a workmanlike manner.

In response to plaintiff's first set of interrogatories, Reynolds identified defendant as playing a role in the selection of materials used in the upgrade. Two of Reynolds' responses are of particular relevance in this regard:

> INTERROGATORY:
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> 22. Please identify the Reynolds Electric, Inc. employees, agents, representatives and/or subcontractors responsible for selecting the materials and related appurtenances utilized in the upgrade to the primary electrical service of Production Plating, Inc.'s facilities situated at 23120 Gratiot Avenue, Eastpointe, Michigan including their full names, addresses, and telephone numbers.
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> ANSWER: This interrogatory assumes that Reynolds Electric, or its employees, were responsible for selecting the materials and relating [sic]

appurtenances utilized in the upgrade to the primary electrical service of the plant. Defendant Reynolds utilized the drawings prepared by DeWulf & Associates and *presented them to DeSteiger, Inc., a distributor [sic] of electrical materials* which in turn utilized Park Metal Electric/Fabricating as the manufacturer or fabricator of the materials and related appurtenances.

* * *

INTERROGATORY:

27. Please identify the texts, journals, treatises, codes and/or any other resources of any kind upon which Reynolds Electric, Inc.'s employees, agents, representatives and/or subcontractors relied in the selection of the materials and related appurtenances utilized in the upgrade to the primary electrical service of Production Plating, Inc.'s facilities situated at 23120 Gratiot Avenue, Eastpointe, Michigan.

ANSWER: Reynolds Electric, with the drawings prepared by DeWulf & Associates, *approached DeSteiger for assistance in providing materials to meet the requirements of the architect* and Production Plating for the installation of new buss duct and appurtenances. *It is believed that DeSteiger then sent the information provided to Reynolds to various manufacturers*, including Park Electric/Fabricating. *The successful bidder then delivers materials to DeSteiger* and/or to Reynolds for installation. Reynolds Electric did not use any specific texts, journals, or treatises in the selection of the materials used in the upgrade of electrical service to Production Plating. [Emphasis added.]

Plaintiff thereafter filed a first amended complaint asserting, in pertinent part, claims of negligence and breach of warranty against defendant Ray Electric. Plaintiff alleged that "[u]pon information and belief, some or all of the materials utilized by Reynolds Electric, Inc., in the upgrade to the primary electrical service of Production Plating, Inc.'s facilities were purchased from Raymond DeSteiger, Inc., doing business as Ray Electric," a company "engaged in the business of selling electrical equipment and supplies associated with the transmission of electrical power. . . ." Plaintiff specifically alleged that defendant supplied all or some of the materials used by Reynolds, and that defendant breached its duty to supply materials that were safe and did not present an unreasonable risk of fire. Plaintiff also alleged that defendant breached express and/or implied warranties that the materials were fit and safe for their intended purpose and of merchantable quality. Following further extensive discovery as to the origins of the fire, defendant was dismissed with prejudice from the instant action after plaintiff acquiesced to defendant's motion for summary disposition.

Defendant moved for sanctions against plaintiff arguing that, in its first amended complaint, plaintiff alleged that Reynolds, not defendant, was responsible for selecting the materials used in the upgrade and that plaintiff lacked support for its claim that defendant breached any express or implied warranties. Defendant maintained that nothing in Reynolds' responses to Interrogatories 22 and 27 indicated that Ray Electric selected the materials used in the electrical upgrade at Production Plating, or that Ray Electric acted as anything other than a distributor of the materials used in the project. Defendant further argued that plaintiff's

allegations regarding breach of warranties were completely without factual basis and devoid of arguable legal merit. According to defendant, it was shielded from liability pursuant to MCL 600.2947(6), which provides that a seller is not liable unless (1) it "failed to exercise reasonable care, including breach of any implied warranty, with respect to the product and that failure was a proximate cause of the person's injuries"; or (2) it "made an express warranty as to the product, the product failed to conform to the warranty, and the failure to conform to the warranty was a proximate cause of the person's harm." Defendant argued that, as a distributor of electrical products, it had no liability under the statute. Finally, defendant alleged that plaintiff's expert was unable to identify any act or omission that would subject defendant to liability. In sum, defendant asserted that plaintiff's claims were frivolous and that plaintiff's attorney signed the first amended complaint and its responses to defendant's interrogatories in violation of MCR 2.114(D). Accordingly, defendant argued that it was entitled to sanctions pursuant to MCR 2.114(E) and costs pursuant to MCR 2.114(F), MCR 2.625(A)(2), and MCL 600.2591.

Plaintiff responded that it filed its amended complaint in good faith reliance on the information obtained from Reynolds' responses to plaintiff's interrogatories, which, according to plaintiff, indicated that defendant may have played an active role in the selection of the materials used in Production Plating's electrical upgrade. Plaintiff noted that, after completion of the depositions of various expert witnesses, it unsuccessfully offered to voluntarily dismiss Ray Electric.

Following oral arguments on defendant's motion for sanctions and costs, the court issued its written order and opinion denying the motion. The trial court reasoned as follows:

> At the outset, the Court notes that Reynolds' answers to plaintiffs' interrogatories indicated that Ray may have exercised some discretion in the selection of materials it distributed to Reynolds. Inasmuch as the instant controversy is complex in nature, the Court opines that plaintiffs had acted reasonably in adding Ray to this action following Reynolds' discovery disclosures. Shortly after Reynolds' expert was deposed, plaintiffs stipulated to the dismissal of Ray from this suit. The Court opines that plaintiffs would not have been acting prudently if they had agreed to dismissal prior to such time. Under these circumstances, the Court cannot conclude that plaintiffs' claims against Ray were "frivolous" for the purposes of *MCR 2.114*, *MCR 2.625,* and *MCL 600.2591*. [Emphasis in original.]

Defendant Ray Electric now appeals. The sole issue before this Court is whether the trial court clearly erred in denying defendant's motion for sanctions. A trial court's finding that a claim or defense was or was not frivolous will not be reversed on appeal unless clearly erroneous. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002); *In re Costs & Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made. *Kitchen, supra* at 661-662.

MCL 600.2591 provides in pertinent part:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award

to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

* * *

(3) As used in this section:

(a) "Frivolous" means that at least 1 of the following conditions is met:

(i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.

(ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.

(iii) The party's legal position was devoid of arguable legal merit.

See also *Kitchen, supra* at 662.

Pursuant to MCR 2.114(F),[1] a party who files a frivolous claim or defense is subject to the assessment of costs pursuant to MCR 2.625(A)(2), which in turn provides that "if the court

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[1] MCR 2.114 provides in pertinent part:

(D) Effect of Signature. The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that

(1) he or she has read the document;

(2) to the best of his or her knowledge, information and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and

(3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(E) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591."

As this Court explained in *Attorney General v Harkins*, 257 Mich App 564, 576; 669 NW2d 296 (2003):

> The frivolous claims provisions impose an affirmative duty on each attorney to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed. *LaRose Market, Inc v Sylvan Ctr, Inc*, 209 Mich App 201, 210; 530 NW2d 505 (1995). The reasonableness of the inquiry is determined by an objective standard. *Id*. The focus is on the efforts taken to investigate a claim before filing suit, and a determination of reasonable inquiry depends on the facts and circumstances of the case. *Id.* The attorney's subjective good faith is irrelevant. *Lloyd v Avadenka*, 158 Mich App 623, 630; 405 NW2d 141 (1987). That the alleged facts are later discovered to be untrue does not invalidate a prior reasonable inquiry. *Lockhart v Lockhart*, 149 Mich App 10, 14-15; 385 NW2d 709 (1986).

In the instant case, defendant argues, as it did below, that the trial court clearly erred in denying Ray Electric's motion for sanctions and costs because plaintiff violated the requirements of MCR 2.114 and because plaintiff's claims were devoid of arguable legal merit and therefore frivolous. We disagree.

"Not every error in legal analysis constitutes a frivolous position." *Kitchen*, *supra* at 663. The fact that a plaintiff did not ultimately prevail does not render the complaint frivolous: "[M]erely because this Court concludes that a legal position asserted by a party should be rejected does not mean that the party was acting frivolously in advocating its position." *Id*. See also *Jerico Construction, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003).

We cannot conclude that the trial court clearly erred when it determined that plaintiff acted reasonably in adding defendant to the underlying action in light of Reynolds' answers to interrogatories 22 and 27. Based on Reynolds' suggestion in these discovery responses that someone other than Reynolds was responsible for selecting the materials, and Reynolds' statement that defendant was approached for assistance in providing materials and participated in the bidding process by selecting the manufacturer, it was not frivolous for plaintiff to add defendant to its cause of action. As noted by the trial court, the underlying action was complex in nature. Discovery in this matter involved extensive testing of components recovered from the fire at Production Plating to determine the origin of the fire. Shortly after the amended complaint was filed, plaintiff's expert issued a report in which he initially opined that the fire was attributable to the selection of materials, i.e., a "busway screw lug connection overheated," and "[t]he heat generated at the degraded junction eventually resulted in the ignition of nearby combustibles." Ultimately, however, further metallurgical testing showed that the materials used in the upgrade appeared to be reasonably fit for use in the project; as noted by the trial court, a few days after Reynold's expert was deposed, plaintiff's counsel forwarded a proposed stipulation and order dismissing both defendant and another defendant, Park Electric, from the suit. Park Electric signed the stipulation, while defendant filed its motions for summary disposition and for sanctions. Under the circumstances, the trial court was in the best position to judge the complexity of this case, and we are not "left with a definite and firm conviction that a

mistake" was made when the trial court concluded that plaintiff's attempt, in its first amended complaint, to hold defendant liable for its role in the electrical upgrade that purportedly went awry, was not without reasonable factual or legal basis at the time it was filed.

Moreover, we conclude that the trial court did not clearly err in finding that plaintiff did not violate MCR 2.114(E) by signing and submitting its interrogatory response that claimed a defect existed in the materials. When plaintiff signed the interrogatory responses in February 2002, an expert report had been provided that stated that "a busway screw lug connection overheated." It was reasonable for plaintiff to rely on this as an indication that the materials were defective. That this was later discovered to be untrue is irrelevant. *Attorney General v Harkins*, *supra* at 576. We therefore affirm the trial court's order denying defendant costs and sanctions.

Affirmed.

/s/ Richard Allen Griffin
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra